OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 88-4 March 14, 1988

TO: All Regional Directors, Officers-in-Charge and Resident Officers

FROM: Rosemary M. Collyer, General Counsel

SUBJECT: Cases Involving a Failure to Make Contributions Into a Pension Fund --Laborers Health & Welfare Trust Fund v. Advance Lightweight Concrete Co., ___ U.S.___ (Feb. 23, 1988)

In the captioned case, the Supreme Court held that the NLRB has exclusive jurisdiction over a claim that an employer has unlawfully failed to make contributions into a pension fund after the expiration of the collective-bargaining agreement. The Court drew a distinction between delinquencies which occur under the collective-bargaining agreement and those which occur thereafter. The former are contractual and can be recovered by means of a lawsuit under Sections 502(g)(2) and 515 of ERISA. However, the latter arise solely from Section 8(a)(5) of the NLRA, and can be recovered only by means of an appropriate charge filed with the NLRB.

In light of the above, Regions can anticipate Section 8(a)(5) charges based on a failure to make contributions after the expiration of the contract. Such charges should not be deferred because of an anticipated lawsuit, because, as discussed supra, such a lawsuit would be dismissed on jurisdictional grounds. In processing these charges, the Region should apply traditional concepts of NLRA law, e.g., whether a good-faith impasse has been reached (which impasse would privilege the change) and whether the union waived its statutory right to require contributions in the post-contract period.

On the other hand, if the delinquency occurs under the contract, there is a potential for an ERISA lawsuit and a Section 8(d)-8(a)(5) charge with the NLRB. If there is a pending ERISA suit, the Region should defer the processing of the NLRB case, pending the outcome of the suit. If there is no such suit, the Region should not defer based on the mere potential of such a suit. However, in the latter situation, the Region should

consider deferral under Collyer Insulated Wire, 192 NLRB 837 (1971), and United Technologies Corp., 267 NLRB 557 (1984). 1/

A problem is presented in situations where the employer's delinquency begins during a contractual period and extends into the post-contractual period. In that situation, part of the claim is cognizable under ERISA and part of it is exclusively cognizable under the NLRA. If there is no pending ERISA suit, the Region should proceed with the entire case, assuming that the charge is meritorious. 2/ If there is a pending suit, the Region should proceed with that portion of the case which relates to the post-contract delinquency, assuming that the charge as to this part is meritorious.

If there are issues not resolved by this memorandum, they should be submitted to the Division of Advice.

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1/ Familiar Collyer concepts would be applied. Thus, if the dispute turns on a question of contract interpretation, and grievance-arbitration machinery is available, deferral may be appropriate. However, if the employer does not raise a bona fide issue of contract interpretation, Collyer deferral would generally not be appropriate. See Oak-Cliff Golman, 207 NLRB 1063.

2/ There would ordinarily be no Collyer deferral of the case. Although the contractual delinquency would ordinarily be cognizable by the grievance-arbitration machinery, the post-contractual delinquency would ordinarily not be. Where part of a case is deferable and the other part is not deferable, the case is not deferred. Sheet Metal Workers (George Koch Sons, Inc., 199 NLRB 166 (1972).